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5
6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
8

9 Jesus Alfonso Galindo-Adarga,)

CASE NO. 05-CV-0533-TUC-FRZ
04-CR-2234-TUC-FRZ

10 Petitioner,)

ORDER

11 vs.)

12 United States of America,)

13 Respondent.)
14)
15)

16 Petitioner has filed a "Motion to Vacate, Set Aside or Correct Sentence by a Person
17 in Federal Custody (28 U.S.C. § 2255)."

18 Rule 4(b) of the Rules Governing Section 2255 Proceedings for the United States
19 District Courts provides, in relevant part, that

20 [i]f it plainly appears from the motion, any attached exhibits,
21 and the record of prior proceedings that the moving party is not
22 entitled to relief, the judge must dismiss the motion and direct
the clerk to notify the moving party.

23 28 U.S.C. foll. § 2255.

24 **Background**

25 Pursuant to a plea agreement, Petitioner entered a plea of guilty to Count Two of the
26 Indictment, which charged him with knowingly and intentionally possessing with the intent
27 to distribute approximately 11.06 kilograms of cocaine, in violation of 21 U.S.C. § 841(a)(1)
28 and (b)(1)(A)(ii)(II).

1 Pursuant to the plea agreement, Petitioner waived “any and all motions, defenses,
2 probable cause determinations, and objections which [he] could assert to the indictment or
3 to the Court’s entry of judgment against [him] and imposition of sentence upon [him]
4 consistent with [the plea] agreement.” In addition, Petitioner waived “any right to
5 collaterally attack [his] conviction and sentence under Title 28, United States Code, Section
6 2255.”

7 The plea agreement provided for a sentencing range of 57-71 months. The United
8 States reserved the right to withdraw from the plea agreement if Petitioner received a
9 sentence of less than fifty-seven months. The Court imposed a sentence of fifty-seven
10 months, the lowest possible sentence under the plea agreement.

11 Discussion

12 A. Downward Departure

13 In his motion, Petitioner seeks a reduction of his sentence based on his minor role in
14 the offense, claiming that the Court “incorrectly determined” his role in the offense. This
15 claim is waived pursuant to the plea agreement. Moreover, this claim is not the proper
16 subject of a § 2255 motion. *See Lizarraga-Lopez v. United States*, 89 F. Supp. 2d 1166, 1168
17 (S.D. Cal. 2000) (section 2255 motion facially deficient when petitioner “seeks a downward
18 departure, which is within the sentencing court’s discretion but which does not implicate
19 constitutional or jurisdictional issues with regard to his conviction or sentence.”). Finally,
20 the Court did not “incorrectly” determine Petitioner’s role in the offense. The Court did not
21 need to determine Petitioner’s role in the offense before sentencing him to the lowest
22 sentence available under the plea agreement.

23 B. Ineffective Assistance of Counsel

24 1. Ineffective Assistance in Plea Agreement

25 It appears Petitioner is asserting a claim of ineffective assistance of counsel related
26 to his decision to plead guilty. Petitioner alleges that “defense counsel misrepresented and
27 misadvised the plea to defendant about the condition of his plea bargain when specifically
28 enquired by defendant, in as much as counsel knew that defendant’s whole behavior and

1 guilty plea was structured to avoid a plea agreement that would not result in a long sentence
2 or prison time” and that Petitioner “detrimentally rel[ied] on counsel’s advice, [and] pled
3 guilty to the charge.”

4 When a defendant pleads guilty based upon the advice of counsel, the defendant can
5 ““only attack the voluntary and intelligent character of the guilty plea by showing that the
6 advice he received from counsel”” was outside ““the range of competence demanded of
7 attorneys in criminal cases”” **and** was prejudicial. *Hill v. Lockhart*, 474 U.S. 52, 56-59, 106
8 S. Ct. 366, 369-70, 88 L. Ed. 2d 203 (1985) (quoting *Tollett v. Henderson*, 411 U.S. 258,
9 267, 93 S. Ct. 1602, 1608, 36 L. Ed. 2d 235 (1973), and *McMann v. Richardson*, 397 U.S.
10 759, 771, 90 S. Ct. 1441, 1449, 25 L. Ed. 2d 763 (1970)). “[T]o satisfy the ‘prejudice’
11 requirement, the defendant must show that there is a reasonable probability that, but for
12 counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.”
13 *Id.* at 59, 106 S. Ct. at 370.

14 Petitioner does not specify what advice counsel gave that fell outside the range of
15 competence for criminal attorneys. Moreover, Petitioner faced a significantly more serious
16 sentence had he been found guilty after a trial. He does not dispute that his Base Offense
17 Level was 32, that he was eligible for a two-level reduction under the Safety Valve, and that
18 he had a Criminal History I. Under the Sentencing Guidelines, the sentencing range for an
19 Offense Level 30 and Criminal History I is 97-121 months. Petitioner has failed to
20 demonstrate any reasonable probability that, when his “whole behavior” was structured to
21 avoid a long prison sentence, he would have proceeded to trial facing a sentencing of 97-121
22 months, rather than accept a plea agreement which capped his sentence at 71 months.¹
23 Accordingly, Petitioner’s claim fails. *See Pollard v. White*, 119 F.3d 1430, 1435 (9th Cir.
24 1997) (Court “do[es] not have to evaluate both prongs of the [*Strickland*] test if the defendant
25 fails to establish one.”).

26
27 ¹Moreover, had Petitioner proceeded to trial, he would have also faced trial on Count
28 One of the Indictment – importation of approximately 11.06 kilograms of cocaine.

2. Ineffective Assistance at Sentencing

Petitioner alleges that he was denied the effective assistance of counsel at sentencing because his attorney failed to investigate and present mitigating evidence at sentencing and seek a downward departure based on the fact that he was the sole caretaker and sole source of economic support for his family. He also alleges that his attorney was ineffective for failing to seek a downward departure based on his compliance with a “Fast Track” program, his compliance with an “Early Disposition” program, and the fact that his conduct was aberrant behavior.

To prevail on a claim of ineffective assistance of counsel, Petitioner must show both that his counsel’s representation fell below an objective standard of reasonableness **and** that counsel’s deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984).

First, Petitioner’s attorney argued in his sentencing memorandum that the Court should consider the issues identified by the Probation Officer regarding Petitioner’s aberrant conduct and significant family ties and responsibilities. Second, the Court actually did depart pursuant to the plea agreement “based on § (5K3.1) Early Disposition Program and savings to the government by early plea and waiver of appeal.”² Finally, Petitioner’s attorney repeatedly urged the Court to adopt the Probation Officer’s recommendation and sentence Petitioner to fifty-seven months’ imprisonment, the lowest sentence under the plea agreement. The Court did.

Had Petitioner’s attorney sought, and the Court imposed, a sentence below fifty-seven months, the United States would have had the right under the plea agreement to withdraw from the plea agreement. Had the United States done so, the Sentencing Guideline range would have been significantly higher. Additionally, there was no guarantee that the Court would have opted to depart based on the claims Petitioner raises and no guarantee that the Court would have imposed a sentence of less than fifty-seven months. Therefore, seeking

²Petitioner’s plea agreement was designated as a “Fast Track 5K3.1” plea agreement.

1 a sentence below fifty-seven months ultimately could have resulted in a sentence that was
2 significantly longer than the sentence actually imposed.

3 Petitioner's counsel's conduct was not unreasonable under the circumstances.
4 Accordingly, Petitioner's ineffective assistance claim fails. *See Pollard*.


5
6 **Conclusion**

7 Accordingly,

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9 **IT IS ORDERED** that Petitioner's § 2255 Motion (U.S.D.C. document #23 in
10 CR-04-2234-TUC-FRZ) is **DENIED** and this case (CV-05-533-TUC-FRZ) is **DISMISSED**.

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12 **IT IS FURTHER ORDERED** that the Clerk of the Court **SHALL SERVE** a copy
13 of the Motion and this Order on Respondent and **SHALL SERVE** a copy of this Order on
14 Petitioner.

15 DATED this 26th day of September, 2005.

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18 FRANK R. ZAPATA
19 United States District Judge
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